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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 TUDOR INSURANCE COMPANY, a  
10 New Hampshire corporation,

11 Plaintiff,

12 v.

13 HELICKSON REAL ESTATE, et al.,

14 Defendants.

CASE NO. C10-5925BHS

ORDER

15 This matter comes before the Court on Defendants Hellickson Real Estate;  
16 Hellickson.com, Inc., a Washington corporation; The Short Sale Company, LLC, a  
17 Washington limited liability company; Perfect Fit Homes; Club Wealth, a Washington  
18 limited liability company; and Michael and Tara Hellickson's (collectively  
19 "Hellicksons") motion for summary judgment (Dkt. 32), the Hellicksons' motion to strike  
20 (Dkt. 39), and Plaintiff Tudor Insurance Company's ("Tudor") cross-motion for summary  
21 judgment (Dkt. 36). The Court has considered the pleadings filed in support of and in  
22 opposition to the motions and the remainder of the file and hereby grants Tudor's motion  
23 and denies the Hellicksons' motions for the reasons stated herein.

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25 **I. PROCEDURAL HISTORY**

26 On December 21, 2010, Tudor filed a complaint for declaratory relief against the  
27 Hellicksons. Dkt. 1. On January 26, 2011, the Hellicksons answered and asserted  
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1 counterclaims for breach of contract, bad faith insurance conduct, violations of various  
2 Washington insurance regulations, and a violation of the Washington Consumer  
3 Protection Act (“CPA”), RCW Chapter 19.86. Dkt. 9.

4 On June 24, 2011, the Hellicksons filed a motion for summary judgment. Dkt. 32.  
5 On July 15, 2011, Tudor responded and filed a cross-motion for summary judgment. Dkt.  
6 36. On July 22, 2011, the Hellicksons replied to Tudor’s response and included a motion  
7 to strike certain material submitted by Tudor. Dkt. 39. On August 8, 2011, the  
8 Hellicksons responded to Tudor’s motion. Dkt. 40. On August 12, 2011, Tudor replied  
9 to the Hellicksons’ response. Dkt. 43.

## 10 **II. FACTUAL BACKGROUND**

11 In August 2010, Tara Hellickson (“Tara”) completed and submitted applications  
12 for an insurance quote from Tudor on an Errors & Omissions Liability Policy. Dkt. 34,  
13 Declaration of Tara Hellickson (“Tara Decl.”), ¶ 2. On August 12, 2010, Tara submitted  
14 a Real Estate Professionals Errors and Omissions Liability Application (“E&O  
15 Application”). *Id.*, Exh. A at 1-4. On August 24, 2010, Tara submitted a Real Estate  
16 Agent & Brokers Supplement Insurance Application for Errors & Omissions insurance  
17 (“Supplement Application”). *Id.*, Exh. A at 5-6. Tara declares that she filled out the  
18 applications “to the best of [her] knowledge” and that she believed all the information she  
19 provided was “correct.” *Id.*, ¶ 2. She also declares that she filled out the applications in  
20 “good faith” and that she did not intend “to mislead or be deceptive to Tudor.” *Id.*

21 The E&O Application requested information regarding any claims or potential  
22 claims against the applicant or others listed in the application. The questions were as  
23 follows:  
24

25 31) Have any claims (including violations of fair housing laws) been  
26 made against your firm, any predecessor firm or anyone indicated in  
27 Question 5 or 6?  
28

1           32) Are you aware of any act, error, omission or other circumstances,  
2           which might reasonably be expected to be the basis of claim or suit against  
3           you or anyone indicated in Question 5 or 6?

4 E&O Application at 4. Tara placed an “X” in the “No” box for both of these questions.

5 *Id.* Tara signed the application as Vice President for Hellickson Real Estate and certified  
6 as follows:

7           I/we hereby declare that the above statements and particulars are true  
8           and that I/we have not suppressed or misstated any material facts and I/we  
9           agree that this application shall be the basis of the contract with the  
10          Company and that coverage, if written, will be provided on a claims made  
11          basis.

12 *Id.*

13           The Supplement Application specifically sought information related to  
14 investigations by regulatory agencies or professional review boards by requesting  
15 information as follows:

16           11. Have you or any member of the firm (including owners, officers,  
17           partners or employees) been reprimanded, cautioned, investigated or been  
18           involved in any suit or investigatory proceeding by any regulatory agency,  
19           professional review board or similar body for actual or alleged violations  
20           arising out of professional activities?

21           If yes, explain (on a separate sheet) the full details and resolution of  
22           any such incident, including the dollar amounts of any fine imposed.

23 Supplement Application at 2. Tara answered “Yes” to this question and provided an  
24 explanation as follows: “ASSOCIATION FINE (MLS) HANDLED THROUGH  
25 APPEAL – REDUCED OR DROPPED – NO CLAIMS MADE.” *Id.* Tara signed the  
26 application as Owner of Hellickson Real Estate, LLC, and certified that “reasonable  
27 inquiry has been made to obtain the answers herein which are true, correct, and complete  
28 to his/her best knowledge and belief.” *Id.* The application also provided that “[a]ll  
information requested in the application is considered material and important.” *Id.*

          On August 29, 2010, Tudor issued the Hellicksons’ E&O Policy. Dkt. 37,  
Declaration of Troy A. Biddle (“Biddle Decl.”), Exh. 1 (“Policy”). The Policy states that  
Tudor was providing the Hellicksons’ coverage “in reliance upon the statements in the

1 Insured's application attached hereto and made a part hereof . . . ." *Id.* at 4. The Policy's  
2 "OTHER CONDITIONS" provision, section "G. APPLICATION" states "by acceptance  
3 of this policy, the Insured agrees that the statements in the application are true  
4 representations [and] that this policy is issued in reliance upon the truth of such  
5 representations . . . ." *Id.* at 8.

6 On September 2, 2010, the Washington Department of Licensing ("DOL") filed a  
7 disciplinary proceeding against the Hellicksons. Biddle Decl., Exh. 3 at 5-7. On  
8 September 29, 2010, the Hellicksons tendered defense of the disciplinary proceeding to  
9 Tudor. Tara Decl., ¶ 4. On November 8, 2010, Tudor acknowledged the Hellicksons'  
10 claim. *Id.*, Exh. B. On December 15, 2010, Tudor rescinded the E&O Policy based on  
11 intentional misrepresentations in the insurance applications. Biddle Decl., Exh. 6  
12 ("Rescission Letter").

13  
14 The Rescission Letter lists several complaints made by the Hellicksons' clients to  
15 the DOL ranging from October 2009 to July 2010. *Id.* at 3-5. Some of the complaints  
16 resulted in the DOL sending letters to the Hellicksons and their attorney, Mr. Doug  
17 Tingvall, in which the DOL investigator stated that "[i]t appears from our analysis that  
18 grounds may exist to pursue administrative action against you for possible  
19 misrepresentation, negligence, incompetence and/or malpractice." Dkt. 38, Declaration of  
20 Karen Jarvis, Exhs. A-D, F, H ("DOL Letters"). The investigator further stated that the  
21 file "will be forward[ed] to the Legal Section for further consideration. The case file will  
22 be reviewed by that unit to determine if the evidence obtained warrants pursuing  
23 administrative action on behalf of the State of Washington." *Id.*

24 Tara declares that the DOL administrative action was a "complete surprise to [her]  
25 and her husband." Tara Decl., ¶ 3. She also declares that, when she filled out the  
26 applications for insurance, she "thought [the] issues with the [DOL] had been resolved."  
27 *Id.*, ¶ 2.  
28

### III. DISCUSSION

#### A. Hellicksons' Motion to Strike

The Hellicksons move to strike portions of the Biddle Decl., the Declaration of Karen Jarvis, and the Declaration of Robin Jones on the basis that the documents contain information that is irrelevant, inadmissible, and highly prejudicial. Dkt. 39 at 11-12. The Court will not explicitly strike material, but it will disregard material that does not relate to the issues before the Court. Therefore, the Court denies the Hellicksons' motion and will set forth the facts that the Court relies upon to render decisions on the parties' motions.

#### B. Summary Judgment

The Hellicksons move for summary judgment on the issue of whether Tudor breached its duty to defend the Hellicksons in the DOL disciplinary proceeding. Dkt. 32. Tudor moves for summary judgment on the issue of whether it was proper to rescind the E&O Policy and requests dismissal of all of the Hellicksons' counterclaims. Dkt. 36.

##### 1. Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if

1 there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
2 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
3 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d  
4 626, 630 (9th Cir. 1987).

5 The determination of the existence of a material fact is often a close question. The  
6 Court must consider the substantive evidentiary burden that the nonmoving party must  
7 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
8 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
9 issues of controversy in favor of the nonmoving party only when the facts specifically  
10 attested by that party contradict facts specifically attested by the moving party. The  
11 nonmoving party may not merely state that it will discredit the moving party’s evidence at  
12 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*  
13 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,  
14 nonspecific statements in affidavits are not sufficient, and missing facts will not be  
15 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

## 17 **2. Rescission**

18 “Contract rescission is an equitable remedy in which the court attempts to restore  
19 the parties to the positions they would have occupied had they not entered into the  
20 contract.” *Bloor v. Fritz*, 143 Wn. App. 718, 739 (2008) (citing *Hornback v. Wentworth*,  
21 132 Wn. App. 504, 513 (2006), *review granted*, 158 Wn.2d 1025 (2007)). With regard to  
22 an insurance contract, rescission is permitted where

23 (1) [the insured] represented certain information as truthful to [the insurer]  
24 during the negotiation of the insurance contract, (2) those representations  
25 were untruthful; that is, they were misrepresentations, (3) the  
26 misrepresentations were material, and (4) they were made with the intent to  
27 deceive [the insurer].

28 *Cutter & Buck, Inc. v. Genesis Ins. Co.*, 306 F. Supp. 2d 988, 997 (W.D. Wash. 2004).

With regard to Tudor’s burden of proof on the issue of rescission, “[m]isrepresentation in

obtaining insurance must be proved by clear, cogent, and convincing evidence.” *Queen City Farms v. Cent. Nat’l Ins. Co. of Omaha*, 126 Wn.2d 50, 97 (1994) (citing *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462 (1969)).

**a. Representations**

In this case, the Hellicksons represented that no claims, including violations of the fair housing law, had been made against them and that they were not aware of any act, error, omission or other circumstances which might reasonably be expected to be the basis of claim or suit against them. *See* E&O Application. They also represented that the full details of any reprimand, caution, investigation, or investigatory proceedings by a regulatory agency was a fine by a listing service that was reduced or dropped and no claims were made. *See* Supplement Application. The Hellicksons do not contest that they made these representations. Therefore, the Court finds that the Hellicksons represented certain information as truthful to Tudor in the applications for the Policy.

**b. Untruthful**

Tudor argues that the Hellicksons’ representation were untruthful because of the complaints made to the DOL and the DOL investigations. Dkt. 43 at 4-5. The Hellicksons received letters from the DOL investigator that stated “[i]t appears from our analysis that grounds may exist to pursue administrative action against you for possible misrepresentation, negligence, incompetence and/or malpractice.” *See* DOL Letters. The Hellicksons offer no evidence or argument regarding the existence of the DOL complaints or the DOL Letters. Therefore, the Court finds that the Hellicksons’ representations that no complaints against them had been filed or that no regulatory investigations against them had been conducted were untruthful.

**c. Material**

Three separate means exist for establishing the element of materiality. First, a “representation made in conjunction with an insurance policy application or negotiation is

1 material if the representation influenced the insurance company's decision to issue the  
2 coverage." *Cutter & Buck*, 306 F. Supp. 2d at 1003. Second, "[i]nformation is material if  
3 the information measures the risk, which is the touchstone of any insurance contract." *Id.*  
4 (citing *Verex Assurance, Inc. v. John Hanson Savings and Loan, Inc.*, 816 F. 2d 1296,  
5 1302 (9th Cir. 1987)). Finally, "when an insurer specifically asks information in regard  
6 to a certain matter, the presumption is that the matter is material." *Id.* The presumption  
7 of materiality, like the presumption of deceitful intent, is rebuttable by credible evidence,  
8 and, where there is conflicting evidence, the question of materiality is one for the jury.  
9 *See, e.g., Olson v. Bankers Life Ins. Co. of Nebraska*, 63 Wn.2d 547, 552 (1964).

10  
11 In this case, Tudor argues that the Hellicksons' representations were material to  
12 the issuance of the Policy. Dkt. 43 at 3-4. Tudor asserts that the applications specifically  
13 requested information regarding disciplinary investigations and that the Supplemental  
14 Application explicitly stated that "[a]ll information requested in the application is  
15 considered material and important." *Id.* These applications are clear, cogent, and  
16 convincing evidence that entitles Tudor to the rebuttable presumption that information  
17 regarding disciplinary investigations was material to the issuance of the Policy. On the  
18 contrary, the Hellicksons have failed to provide any credible evidence to rebut this  
19 presumption. They do, however, argue that "a reasonable fact-finder could infer from  
20 Tudor's failure to [investigate the listing service's action that the Hellicksons did  
21 disclose] that the information was not material." Dkt. 39 at 8. Tudor's failure to  
22 investigate an alleged fine by a listing service is not conflicting evidence that a  
23 disciplinary investigation by a government agency based on multiple complaints for  
24 misrepresentations, negligence, incompetence and/or malpractice would not have been  
25 material to the measure of risk for the insurer. Therefore, the Court finds that the  
26 information that was requested by Tudor and that was not provided by the Hellicksons  
27 was material.  
28



1                   **d.      Intent to Deceive**

2           The Washington State Supreme Court has held that “[w]hen a false statement has  
3 been made knowingly, there is a presumption that it was made with intent to deceive.”  
4 *Cutter & Buck*, 306 F. Supp. 2d at 1004 (citing *Music v. United Ins. Co. of Am.*, 59 Wn.2d  
5 765, 769 (1962)). The “presumption is not overcome by the unsupported declaration of  
6 the applicant that no such intent existed in his mind at the time.” *Day v. St. Paul Fire &*  
7 *Marine Ins. Co.*, 111 Wn. 49, 59 (1920); *see also American Fidelity & Cas. Co. v.*  
8 *Backstrom*, 47 Wn.2d 77, 84 (1955) (presumption “is not overcome by the unsupported  
9 denial of the insured.”). Moreover,

10                   [t]he insured’s bare assertion that she did not intend to deceive the  
11 insurance company is not credible evidence of good faith and, in the  
12 absence of credible evidence of good faith, the presumption warrants a  
finding in favor of the insurance company.

13 *Ki Sin Kim v. Allstate Ins. Co., Inc.*, 153 Wn. App. 339, 356 (2009). If, however, there is  
14 credible evidence that the alleged misrepresentations were made without intent to  
15 deceive, then that determination is a question for the jury. *Cutter & Buck*, 306 F. Supp.  
16 2d at 1004.

17           In this case, the Hellicksons argue that Tudor is not entitled to the presumption that  
18 the misrepresentations were made with an intent to deceive because Tudor is unable to  
19 prove that Tara’s misrepresentations were made knowingly. Dkt. 39 at 8. The only  
20 evidence in support of this argument is Tara’s declaration in which she asserts that she  
21 “thought the issues with the [DOL] had been resolved.” Tara Decl., ¶ 2. Consequently,  
22 this assertion is an admission that Tara knew that there were complaints filed with the  
23 DOL and the subsequent DOL investigations. Therefore, the Court finds that, when she  
24 completed the applications, Tara knowingly failed to provide information regarding an  
25 investigation by a regulatory agency, which was specific information requested by Tudor.  
26  
27  
28

1 This finding entitles Tudor to the presumption that the Hellicksons intended to deceive  
2 Tudor.

3 With regard to overcoming this presumption, the only relevant evidence that the  
4 Hellicksons have submitted is Tara's declaration. In Washington, however, the  
5 presumption in favor of the insurer "is not overcome by the unsupported denial of the  
6 insured." *American Fidelity*, 47 Wn.2d at 84. Therefore, the Hellicksons have failed to  
7 provide sufficient evidence to rebut the presumption in favor of Tudor on the issue of  
8 whether the Hellicksons intended to deceive Tudor. In the absence of credible evidence  
9 to the contrary, the presumption warrants a finding in favor of Tudor.

#### 10 **e. Rescission Conclusion**

11 Based on the analysis above, the Court finds that Tudor has provided clear, cogent,  
12 and convincing evidence for each element of rescission. The applications show that the  
13 Hellicksons made certain representations, the DOL letters show that the representations  
14 were untruthful, the applications show that the requested information was material, Tara  
15 Hellickson's declaration shows that she knew of the complaints and investigations, and  
16 the Hellicksons have failed to submit evidence to create a question of fact as to the  
17 element of an intent to deceive. Therefore, the Court grants Tudor's motion for summary  
18 judgment on this issue and concludes, as a matter of law, that Tudor was entitled to  
19 rescind the Policy.

#### 20 **3. Duty to Defend**

21 The insurer's duty to defend the insured is one of the main benefits of the  
22 insurance contract. *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 392 (1992).  
23 "If the insurer is unsure of its obligation to defend in a given instance, it may defend  
24 under a reservation of rights while seeking a declaratory judgment that it has no duty to  
25 defend." *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 761 (2002)  
26 (citing *Grange Ins. Co. v. Brosseau*, 113 Wn.2d 91, 93-94 (1989)). However, insurance  
27  
28

1 contracts obtained by omitting material facts in the application are void *ab initio*.

2 *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 528 (2000).

3 In this case, the Hellicksons argue that “Tudor’s bad faith breach of the duty to  
4 defend bars it from obtaining rescission after the fact.” Dkt. 40 at 24. The flaw in the  
5 Hellicksons’ argument is that they are precluded from deriving any benefit from a  
6 contract that is deemed to be void from the beginning. The duty to defend is a benefit of  
7 an insurance contract and the instant contract was void as of its formation. Therefore, the  
8 Court grants Tudor’s motion on this issue and dismisses Hellicksons’ breach of contract  
9 counterclaim.

#### 10 **4. Bad Faith and CPA**

11 In Washington, bad faith and CPA claims may still lie even in the absence of  
12 coverage under an insurance policy. *Tornetta v. Allstate Ins. Co.*, 94 Wn. App. 803, 810  
13 (1999). However, an insured that perpetrates a fraud upon the insurer is precluded from  
14 pursuing either a bad faith or CPA claim. *Id.* “An insured’s fraud is dispositive in such a  
15 case.” *Id.*

16  
17 In this case, the Hellicksons’ misrepresentation and concealment of material facts  
18 is dispositive. Therefore, the Court grants Tudor’s motion on these issues and dismisses  
19 the Hellicksons’ counterclaims for bad faith and a violation of the CPA.

#### 20 **5. Unfair Claims Settlement Practices**

21 The Hellicksons allege that Tudor violated numerous provisions of Washington’s  
22 Unfair Claims Settlement Practices Regulation, WAC 284-30-300 to -450. Dkt. 40 at 13-  
23 15. The purpose of the regulations “is to define certain minimum standards which, if  
24 violated with such frequency as to indicate a general business practice, will be deemed to  
25 constitute unfair claims settlement practices.” WAC 284-30-300. “Violations of the  
26 standards for unfair claims settlement practices in this regulation are subject to the  
27 enforcement provisions” of Washington’s Insurance Fair Conduct Act (“IFCA”), RCW  
28

1 Chapter 48.30. WAC 284-30-400. Committing a violation of “any one of these acts or  
2 practices constitutes a per se unfair trade practice.” *Dombrosky v. Farmers Ins. Co. of*  
3 *Washington*, 84 Wn. App. 245, *as amended, review denied* 131 Wn.2d 1018 (1996).


4 In this case, the Hellicksons assert that Tudor failed to comply with the unfair  
5 claims settlement practices regulations on several occasions. Dkt. 40 at 13-15. While  
6 Tudor acknowledges at least one failure to comply with a regulation (Dkt. 43 at 7 n. 5), it  
7 argues that the violation was “nothing more than a technical error that does not entitle  
8 [the Hellicksons] to any damages.” *Id.* The Court agrees with Tudor to the extent that  
9 the Hellicksons are not entitled to any damages or to pursue this cause of action because  
10 an insured’s fraud is dispositive on a claim for an unfair trade practice. *Tornetta*, 94 Wn.  
11 App. at 810. Therefore, the Court grants Tudor’s motion on this issue and dismisses the  
12 Hellicksons’ counterclaims for violations of the unfair settlement practices regulations.

#### 13 IV. ORDER

14 Therefore, it is hereby

15  
16 **ORDERED** that the Hellicksons’ motion for summary judgment (Dkt. 32) and  
17 motion to strike (Dkt. 39) are **DENIED**, Tudor’s cross-motion for summary judgment  
18 (Dkt. 36) is **GRANTED**, and the Hellicksons’ counterclaims are **DISMISSED**. The  
19 Clerk shall enter judgment for Tudor and close this action.

20 DATED this 29th day of August, 2011.

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22   
23 BENJAMIN H. SETTLE  
24 United States District Judge  
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